STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BOBBIE GENE DILLARD,

Defendant-Appellant.

UNPUBLISHED
January 20, 1998

No. 195193
Berrien Circuit Court
LC No. 94-001763-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH THOMAS AVERY,

Defendant-Appellant.

No. 195194
Berrien Circuit Court
LC No. 94-001800-FH

Before: Markey, P.J., and M.J. Kelly and Whitbeck, JJ.

PER CURIAM.

Defendants' cases were consolidated. They now appeal as of right their convictions by a jury of burning a dwelling house, MCL 750.72; MSA 28.267.[1] Both defendants were sentenced to two to twenty years' imprisonment. We affirm.

I

Defendant Avery first argues that the trial court erred in not directing a verdict of acquittal, after the presentation of the prosecution's case-in-chief, regarding the charged offenses of burning a dwelling

house and burning insured property. Defendant Avery also claims that the trial court's alleged error in not directing a verdict of acquittal on the burning insured property charge prejudiced his case because his chance of acquittal on the burning a dwelling house charge was decreased by the possibility of a compromise verdict.[2] We disagree.

In reviewing a claim that the court erroneously denied defendant's motion for a directed verdict of acquittal, this Court must determine whether the evidence was sufficient to support a conviction. MCR 6.419(A). Accordingly, the test to determine whether a motion for directed verdict should have been granted is whether, viewed in the light most favorable to the prosecution, the evidence was sufficient to permit a rational trier of fact to find the essential elements of the crime proven beyond a reasonable doubt. *People v Herbert*, 444 Mich 466, 473; 511 NW2d 654 (1993).

The elements of burning a dwelling house, also known as arson, are that (1) a dwelling house was burned, (2) by, or at the urging of, or with the assistance of the defendant and (3) the fire was willfully or maliciously set. *People v Lindsey*, 83 Mich App 354, 355; 268 NW2d 41 (1978). Here, the prosecution presented sufficient evidence at trial to permit the jury to reasonably infer that someone intentionally set the fire at the house using flammable liquids. Two witnesses heard defendant Avery say that he and defendant Dillard burned the house. A witness saw defendant Avery driving a small red or blue vehicle that day, and a red Festiva was seen squealing its tires and speeding away from the scene while the house was on fire. Both defendants were at the scene in the morning shortly before the fire. The evidence also showed that the property was insured for over $200,000, and defendant Dillard submitted an insurance claim for $241,187.80. Additionally, defendant Avery was heard joking about the fire, referring to pockets full of money, and mentioning that he would be leaving town. James Clark further testified that defendant Dillard offered him $15,000 to $20,000 to burn the house, but Clark refused the offer. Accordingly, we conclude that there was sufficient evidence to justify a reasonable factfinder in concluding that (1) the house was burned (2) with defendant Avery's assistance and (3) the fire was willfully or maliciously set. Thus, there was sufficient evidence to support defendant Avery's conviction of burning a dwelling house.

The trial court also properly denied defendant Avery's motion for a directed verdict on the charge of burning insured property. The offense of burning insured property consists of (1) burning insured real or personal property (2) with an intent to defraud the insurer. *People v Ayers*, 213 Mich App 708, 721; 540 NW2d 791 (1995). A reasonable juror could have inferred that because defendant Dillard offered to pay Clark to burn the property and told him about the insurance, defendant Dillard made the same offer to defendant Avery. Defendant Avery also made comments regarding the large quantity of money he would soon receive, from which a reasonable factfinder could infer that defendant Avery anticipated being paid a large amount from insurance proceeds paid due to the burning of the house. "Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense." *People v Greenwood*, 209 Mich App 470, 472; 531 NW2d 771 (1995). Viewed in the light most favorable to the prosecution, we find that the evidence presented up to the time of the motion for directed verdict at the end of the prosecution's

proofs would have supported a finding by a rational trier of fact that the essential elements of both burning a dwelling house and burning insured property were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979), cert den 449 US 885; 101 S Ct 239, 66 L Ed 2d 110 (1980).

II

Defendants argue that the prosecutor made improper statements of fact in his closing argument that were unsupported by the evidence in the case. We disagree.

Appellate review of allegedly improper prosecutorial remarks is generally precluded if a defendant fails to object because the trial court is otherwise deprived of an opportunity to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Here, neither defendant objected when the prosecutor made the remarks now challenged. However, review of prosecutorial remarks for unpreserved improprieties is proper if a curative instruction could not have eliminated the prejudicial effect or if failure to consider the issue would result in a miscarriage of justice. *Id.*

In his closing argument, the prosecutor made several factual misstatements by inadvertently interchanging the names of the parties. On at least two of these occasions, the prosecutor corrected himself; other misstatements could have been quickly corrected by the trial court. Therefore, we find that the prejudicial effect of the remarks was not so great that it could not have been cured by an appropriate instruction. Further, we do not believe that these misstatements constituted a miscarriage of justice. *Stanaway, supra* at 687. Thus, defendants have not established error requiring reversal based on this issue.

III

Defendants argue that the trial court erred in denying their motions for a new trial in which they claimed that the jury's verdicts were against the great weight of the evidence. We disagree.

This Court reviews for an abuse of discretion a trial court's grant or denial of a motion for a new trial on the ground that the verdict was against the great weight of the evidence. *Herbert*, *supra* at 477. A trial court's determination whether a verdict is against the great weight of the evidence requires a review of the whole body of proofs. *Herbert, supra* at 475. Such a determination takes into consideration the credibility of the prevailing party's witnesses, *id*. at 476-477, and a ruling that a verdict is not against the great weight of the evidence is accorded substantial deference by this Court. *Arrington v Detroit Osteopathic Hospital Corp (On Remand)*, 196 Mich App 544, 560; 493 NW2d 492 (1992). Therefore, a court's discretion in this regard will not be disturbed on appeal unless a clear abuse is shown. *Herbert*, *supra* at 477.

Here, the evidence sufficiently supported the jury's verdict, and we find nothing in the record upon which to dispute the trial court's denial of a new trial. This case was essentially a credibility

contest between defendants and the prosecution's witnesses, James Clark and Jessie Franklin. We do not believe that the trial court abused its discretion by declining to find the jury's assessment of the case to be against the great weight of the evidence.

IV

Defendants also claim, in essence, that the prosecutor's failure to assist them in ascertaining the identity and whereabouts of a "Jayme Doe," constituted error requiring reversal as a violation of MCL 767.40a; MSA 28.980(1). We disagree.

MCL 767.40a; MSA 28.980(1), provides in pertinent part:

> (1) The prosecuting attorney shall attach to the filed information a list of all witnesses known to the prosecuting attorney who might be called at trial and all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers.
>
> (2) The prosecuting attorney shall be under a continuing duty to disclose the names of any further res gestae witnesses as they become known.
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> * * *
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> (5) The prosecuting attorney or investigative law enforcement agency shall provide to the defendant, or defense counsel, upon request, reasonable assistance, including investigative assistance, as may be necessary to locate and serve process upon a witness. . . .

The prosecution no longer has a statutory duty to locate, endorse and produce unknown persons who may be res gestae witnesses. *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995). The duty to use due diligence has been replaced, in part, with an obligation to provide "reasonable assistance" to locate "a witness" on defendant's request. *Id.* at 288-289. However, the Michigan Supreme Court in *Burwick* also stated, "[t]here is no requirement to exercise due diligence under MCL 767.40a; MSA 28.980(1) to discover the names of witnesses, and we have neither authority nor reason to create one." *Id.* at 293. Further, § 767.40a imposes no duty on the prosecution to discover unknown witnesses. *Id.* at 287. Thus, the prosecution had no duty to attempt to discover the identity of the unknown witness "Jayme Doe."[3] Defendants have not established error requiring reversal based on this issue.

V

Defendants also claim that they were deprived of their due process rights to a fair trial because the cumulative effect of several errors constitutes a miscarriage of justice requiring reversal of their convictions. We disagree.

While it is possible that the cumulative effect of a number of errors may constitute error warranting reversal, *People v Dilling,* 222 Mich App 44, 56; 564 NW2d 56 (1997), "only actual errors are aggregated to determine their cumulative effect," *People v Bahoda,* 448 Mich 261, 292 n 64; 531 NW2d 659 (1995). Because there are no actual errors to be aggregated, there is no merit in defendants' claim.

Affirmed.

/s/ Jane E. Markey
/s/ Michael J. Kelly
/s/ William C. Whitbeck

[1] Defendant Dillard was also found guilty of burning insured property, MCL 750.75; MSA 28.270, but that conviction was subsequently vacated on double jeopardy grounds. We note that, subsequent to defendants' trial, this Court has determined that conviction of both burning a dwelling house and burning insured property based on the same incident does not violate the protection of the Double Jeopardy Clauses of the federal and state constitutions against multiple punishments. *People v Ayers,* 213 Mich App 708, 716-721; 540 NW2d 791 (1995).

[2] Although defendants' statement of questions for this issue suggests that that there was insufficient evidence with regard to both defendants' conviction, they have argued in their brief only that there was insufficient evidence to support defendant Avery's convictions.

[3] In light of *Burwick,* the duty to provide reasonable assistance in locating "a witness" applies only to an witness whose identity is known and specified by the defense.